Othere Limited v Josef & another (Civil Application E058 of 2023) [2023] KECA 715 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KECA 715 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E058 OF 2023

K M'INOTI, HA OMONDI & KI LAIBUTA, JJA

JUNE 9, 2023

BETWEEN

OTHERE LIMITED .... APPLICANT

AND

SCRIBOSKI ROMUALD JOSEF .... 1ST RESPONDENT

THE EUROPEAN FOUNDATION FOR POLISH-KENYAN COOPERATION 2ND RESPONDENT

(Being an application for stay of execution pending appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Nairobi (J. A. Mogeni, J.) delivered on 20th February 2023 in E.L.C Misc. 12 of 2022)

RULING

1. By a plaint dated July 29, 2022, the respondents sued the applicant and 10 others (who are not party hereto) jointly and severally for the following orders: a declaration that their conduct was contrary to the national values and principles of governance; an injunction to restrain them from further construction of Othere apartments on plot no 3736/346 (the suit property), and an order compelling them to demolish the illegally built structures erected thereon and restore the degraded environment as far as is practicable; that Golden Century Limited (the 1st defendant in that suit) do reimburse the respondents the sum of Kshs. 7,500,000 applied in fixing the suit property; general, punitive and exemplary damages; in the alternative, the respondents be refunded the purchase price of the suit property at the then current market value; costs of the suit and interest.

2. Along with the plaint, the respondents filed a notice of motion of even date seeking, inter alia: orders restraining the applicant and its co-defendants from further construction of Othere apartments on the suit property pending hearing and determination of the Motion and the suit; cancellation of the Environmental Impact Assessment Licence (Approval No NEMA/EAI/PSL/15979; NEMA/

EAI/PSR/26846; and NCA Approval Registration No 53127515710222) for construction of the apartments; and costs of the application. The respondents' application was supported by the 1st respondent's affidavit sworn on July 29, 2022, and was anchored on a legion of 52 grounds set out on the face of the motion, which we need not interrogate here.

3. The applicant's case is that they were never served with the respondent's application; that the application had come for hearing inter partes on September 21, 2022; that the application was later mentioned on December 5, 2022 and on February 20, 2023 in the presence of counsel for the applicant, counsel for the respondents and for certain other persons not party to the proceedings herein; that during the last of the two mentions, the trial court gave interim orders restraining the applicant and its co-defendants from further construction of apartments on the suit property pending hearing inter partes of the respondents' motion dated July 29, 2022 and the suit; and that costs of the application do abide outcome of the cause. The trial court also directed that a pre-trial conference be conducted before the deputy registrar on March 6, 2023, and that the respondents' advocates do serve all parties not present in court with notice of the pre-trial conference.

4. Dissatisfied with the interim orders and directions of the ELC (Mogeni, J.), the applicant moved to this Court on appeal on the grounds set out in its memorandum of appeal dated February 23, 2023, namely that the learned Judge erred: by finding that the applicant had been duly served with all pleadings and the application dated July 29, 2022; by finding that the application for injunction was merited; by granting an injunction without according the applicant an opportunity to file a response; by granting an injunction during a scheduled mention; by granting an injunction without ordering for the provision of security by the respondents; and by granting an injunction without considering that the respondents' claim could be settled by award of damages.

5. By a notice of motion dated February 23, 2023 filed pursuant to rule 5(2) (b) of the *Court of Appeal Rules* and supported by the affidavit of Lan Xiao (a director of the applicant company) sworn on February 23, 2023 followed by his supplementary affidavit sworn on March 3, 2023, the applicant prays for: stay of execution of the orders of the ELC (Mogeni, J.) dated February 20, 2023 pending hearing and determination of this application and the intended appeal; security for damages incurred by the applicant and quantified as Kshs. 5,583,929/25 per day, and that such security be deposited in court; and costs of the application.

6. The applicant's motion is anchored on a whopping 17 grounds, which we need not recite here. Suffice it to mention that, in essence, the grounds are, inter alia: that they were served with the mention notice in the trial court only eleven

    1. days before; the interim orders in place are greatly prejudicial and will cause irreparable damage as they stopped the construction of a multi-storey residential development currently on the tenth floor; the respondents have no interest in the subject development and their claim in the substantive suit is based on their ownership of an apartment situated on a neighbouring property known as Golden Century Apartments; that it is unjust for such punitive orders to be given in the preliminary stages during a mention, and according the applicant before an opportunity to be heard; that the intended appeal is arguable, and that it will be rendered nugatory if the stay sought is not granted; and that this application has been made without undue delay. They urge us to grant the Motion as prayed.

7. In support of the motion, learned counsel for the applicant M/s. Kibatia & Company LLP, filed written submissions and a list of authorities dated March 6, 2023 citing this Court's decision in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR on the proposition that a court should not issue injunctive orders where damages can suffice.

8. The respondents oppose the applicant's motion vide the 1st respondent's replying affidavit sworn on March 1, 2023 deposing that the applicant has come to court with "unclean hands" in that they have failed to obey the impugned orders; that the applicants were served twice electronically, but ignores those orders so as to continue construction; that attempts to serve the applicant physically with the pleadings and the accompanying application failed as their counsel declined to accept service; and that the applicant's motion does not meet the threshold for grant of an order for stay of execution. They urge us to dismiss the application with costs.

9. It is noteworthy that learned counsel for the respondents, M/s. Gitonga, Kinyanjui & Company, did not file written submissions. Neither did they attend court at the hearing of the application. That notwithstanding, we are called upon to determine whether the applicant's motion has merit, and whether the applicant has satisfied the requirements for grant of the orders sought pursuant to rule 5(2) (b) of the *Rules of this Court*.

10. This court has pronounced itself time and again that for an applicant to merit orders of stay of execution pursuant to rule 5(2) (b) of the *Court of Appeal Rules* pending appeal, he or she must demonstrate to the satisfaction of the court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory absent an order of stay of execution. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR; and *Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 thers* [2014] eKLR).

11. A cursory look at the grounds of appeal advanced in the applicant's memorandum of appeal dated February 23, 2023 viewed in the backdrop of the record as put to us reveals a number of substantive issues of law and fact deserving of the court's inquiry on appeal. Moreover, and as this court has often stated, even one ground of appeal is adequate to satisfy the first limb of the twin principles. *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR is a case in point. We need not say more with regard to those grounds lest we embarrass the bench that will ultimately pronounce itself on the merits or otherwise of the intended appeal. Suffice it to observe that, as this court held in the case of *Wasike v Swala* [1984] KLR 591, an arguable appeal is not one that would necessarily succeed, but one that merits consideration by the court (also see *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR. An arguable appeal is one that is not idle and/or frivolous.

12. Regarding the second limb of the twin principle, the term "nugatory" was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA p.227 at p.232 as

> " worthless, futile or invalid". It also means "trifling". Having concluded that the applicants' intended appeal is arguable, the decisive question is whether the intended appeal, if successful, would be rendered nugatory if the stay orders sought were not granted.

13. In the case of *African Safari Club Limited v Safe Rentals Limited* [2010] eKLR, this court held:

> " ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

14. On the authority of *African Safari Club Limited* (*ibid*), the court is invited to determine which party's hardship is greater. Put differently, would it serve the course of justice to decline the orders sought with

the effect of halting the construction complained of thereby exposing the applicant to the colossal loss estimated at Kshs.5,583,929/25 for each day such construction stalls? Conversely, would it be in the respondents' interest to be exposed to the risk of ultimately compensating the applicant for loss of such enormity should the applicant's intended appeal succeed? We think not.

15. To our mind, this is the kind of case where an offer for security would ease the dilemma, but no such offer has been extended. We agree with the applicant that granting restraining orders in the circumstances of this case in the absence of an order for security would be a recipe for untold hardship both ways. Clearly, the interim restraining orders at a time when the applicants' construction had reached the tenth floor posed the risk of losses to a magnitude that far outweigh the temporary injunctive relief pending determination of the intended appeal. Moreover, the respondents are prepared to accept compensation to the value of their apartment should the injunctive relief sought in their suit not avail. In prayer VI of their plaint, the respondents pray that "in the alternative the plaintiff be refunded the purchase price of the suit property at current market value". Reference to "suit property" in their plaint means an apartment occupied by the respondents in an apartment block neighbouring the construction site of the applicant's Othere Apartments".

16. What that means is that, if the applicants' prayer for stay of execution of the impugned restraining orders is declined and their intended appeal eventually succeeds, their consequent loss would be so highly disproportionate balanced as against that of the respondents as to render their intended appeal nugatory. On the other hand, the respondents can be compensated by an award of damages equivalent to the quantifiable value of their apartment, an alternative relief they are prepared to accept should their suit succeed.

17. Having carefully examined the impugned ruling, the applicant's motion, the grounds on which it is anchored, the affidavits in support and in reply thereto, the written and oral submissions of learned counsel for the applicant, and the cited authorities, we form the view that the intended appeal, if successful, would be rendered worthless or futile if stay of the restraining orders sought are not granted. In effect, the applicant has satisfied the conjunctive limbs of the twin principles for grant of stay orders under rule 5(2) (b) of the *Rules of this Court*. Accordingly, their motion dated February 23, 2023 succeeds and is hereby granted with orders that:

   a. execution of the order of the Environment and Land Court at Nairobi (Mogeni, J.) given on February 20, 2023 in ELC Misc. Application No 12 of 2022 restraining the applicant from further construction of Other Apartments on plot no 3736/346 be and are hereby stayed pending hearing and determination of the intended appeal; and

   b. the costs of the applicant's motion shall abide the outcome of the intended appeal.

   Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE 2023.

K. M'INOTI

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR